

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ANGELO CRUZ A/K/A ANGELO DIAZ,	:
	:
Plaintiff,	: <u>REPORT AND RECOMMENDATION</u>
	:
-v.-	: 07 Civ. 4014 (BSJ) (GWG)
	:
UNITED STATES DEPARTMENT OF	:
JUSTICE, <u>et al.</u> ,	:
	:
Defendants.	:
	:
-----X	

GABRIEL W. GORENSTEIN, UNITED STATES MAGISTRATE JUDGE

On May 31, 2007, Angelo Cruz a/k/a Angelo Diaz (“Cruz”) filed a complaint against the United States Department of Justice, the United States Attorney for the Southern District of New York, the New York City Police Department, the Drug Enforcement Administration, and Assistant United States Attorney Benjamin M. Lawskey. See Complaint, filed May 31, 2007 (Docket # 2). In his complaint, Cruz alleged that in executing search warrants, the defendants seized items legally in his possession and never returned those items in violation of his Fourth Amendment rights. Id. at 3. He requested that the court “order all the involved agencies/parties to return [his] lawful property which was seized in violation of [his] constitutional rights.” Id. at 5. A later-filed Amended Complaint similarly sought return of his property. See Amended Complaint, filed July 30, 2007 (Docket # 4).

The district court thereafter issued an Order in which it stated that Cruz’s complaint would be construed as “a civil action in equity wherein Plaintiff seeks the return of property allegedly seized by the United States Government.” Order, filed Aug. 3, 2007 (Docket # 6) (citing Adeleke v. United States, 355 F.3d 144, 146-47, 151 (2d Cir. 2004)).

The Government responded by stating that Cruz’s petition is premature given that the direct appeal of his conviction is pending before the Second Circuit. See Letter from John P. Cronan to the Honorable Barbara S. Jones, filed Sept. 24, 2007 (Docket # 9). The Government’s response explained how Cruz could obtain his property following the conclusion of his criminal case.

Upon referral from the district court, this Court issued an Order noting that “the plaintiff’s criminal case is still ongoing, that the items seized are potentially relevant to the criminal proceeding, and that they could not be ordered returned until the termination of the criminal proceeding.” Order, filed Nov. 8, 2007 (Docket # 11). The Court suggested that the case “should be dismissed; that once plaintiff’s criminal case terminates, he should make efforts

to seek return of these items by the mechanism outlined in the Government's letter; and that plaintiff should file a new action in the event these efforts are not satisfactory." Id. The Court gave Cruz until October 5, 2007 to submit a response to the Government's letter indicating any objections to the dismissal of his case. Id.

Cruz submitted a letter dated September 24, 2007 in which he requested that "this court allow me to withdraw my complaint so I may preserve and present my issues at the conclusion of all proceedings so all the facts may than [sic] be fully developed and presented." Letter to the Honorable Gabriel W. Gorenstein from Angelo Diaz, filed Nov. 8, 2007 (Docket # 12). In addition, Cruz asked the Court to "instruct/request the defendants to furnish me a list of items seized during the warrants executed in the complaint or instruct/inform me what steps/actions I must follow to procure such a list/information." Id.

The Government thereafter furnished an inventory list and provided information on how Cruz could seek return of these items upon the conclusion of criminal proceedings. Letter from John P. Cronan to the Honorable Gabriel W. Gorenstein, filed Nov. 8, 2007 (Docket # 13), at 2.

Accordingly, because Cruz has requested to "withdraw" his case and was provided the inventory list he was seeking, the court should dismiss the case without prejudice. Cruz will be free to seek return of the items seized upon the conclusion of criminal proceedings and, if necessary and appropriate, to institute a new action.

Conclusion

For the foregoing reasons, this case should be dismissed without prejudice.

PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have ten (10) days from service of this Report to file any objections. See also Fed. R. Civ. P. 6(a), (e). Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with copies sent to the Honorable Barbara S. Jones, 500 Pearl Street, New York, New York 10007. Any request for an extension of time to file objections must be directed to Judge Jones. If a party fails to file timely objections, that party will not be permitted to raise any objections to this Report and Recommendation on appeal. See Thomas v. Arn, 474 U.S. 140 (1985).

SO ORDERED.

Dated: November 13, 2007
New York, New York

GABRIEL W. GORENSTEIN
United States Magistrate Judge

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Hon. Barbara S. Jones
United States District Judge

SO ORDERED.

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